No. 79-899

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# In the Supreme Court of the United States

OCTOBER TERM, 1979

GEORGE BANTA COMPANY, INC., BANTA DIVISION,
PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 604 F. 2d 830. The decision and order of the National Labor Relations Board (Pet. App. A21-A36) is reported at 236 N.L.R.B. 1559.

### JURISDICTION

The judgment of the court of appeals was entered on August 6, 1979. A petition for rehearing (Pet. App. A20) was denied on September 11, 1979. The petition for a writ of certiorari was filed on December 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Board could properly refuse to permit petitioner to withdraw from a formal settlement stipulation, which provided for a consent order by the Board and a consent decree by the court of appeals, after approval of the settlement agreement by the General Counsel but prior to its final approval by the Board.

2. Whether, in the circumstances of this case, the Board's refusal to permit petitioner to withdraw from the settlement was arbitrary and capricious.

## STATUTE AND REGULATIONS INVOLVED

The relevant administrative regulations, the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.1 *et seq.*, and Statements of Procedure, Series 8, as amended, 29 C.F.R. 101.1 *et seq.*, are reproduced in Appendix E to the petition (Pet. App. A38-A47). The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are as follows:

> Section 3(d). * * * The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160, of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. * * *

## STATEMENT

1. In February 1977, petitioner and the Graphic Arts International Union, Locals No. 32B and No. 88L, AFL-CIO, CLC ("the Union") commenced negotiations for a new contract to replace the contract due to expire on April 4, 1977. Negotiations continued until April 4, at which time petitioner informed the Union that it was immediately implementing its "last contract offer," including provisions for lengthening the work week and limiting employer contributions to a health insurance plan (Pet. App. A2). On the same day, the Union's membership voted to reject these terms and begin a strike (Pet. App. A2). The Union then filed charges with the Board alleging that petitioner had engaged in unfair labor practices (Pet. App. A2).



On June 27, 1977, the Regional Director issued a complaint, charging petitioner with violating Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act by unilaterally implementing its "last contract offer" at a time when negotiations between the parties were continuing and when no bargaining impasse had been reached. The complaint further characterized the strike as an "unfair labor practices strike" (Pet. App. A3). A hearing on the complaint was scheduled for July 11, 1977. In addition, the Regional Director was authorized by the Board to seek interim injunctive relief in federal district court under Section 10(j) of the Act, 29 U.S.C. 160(j), pending resolution of the issues raised by the complaint (Pet. App. A3).

Petitioner entered into settlement negotiations with the NLRB Regional Director, and, on July 22, 1977, executed a formal settlement stipulation[1] agreeing to

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[1]The Board's rules provide for two kinds of settlement agreements, "formal" and "informal." A formal settlement provides for entry of an order by the Board and ordinarily contains the respondent's consent to entry of an enforcement order by the appropriate court of appeals. Board Statements of Procedure, 29 C.F.R. 101.9(b)(1) (Pet. App. A39). An informal settlement does not provide for entry of a Board order or court decree; it provides for

reinstate the employment conditions that existed prior to implementation of its "last contract offer," except for cost-of-living adjustments, arbitration and union security provisions. In addition, the stipulation provided for reinstatement of the strikers upon their unconditional request to return to work under terms equivalent to those for "unfair labor practice strikers" (Pet. App. A3-A4). The stipulation also provided for entry of an order by the Board based upon its terms and was expressly "subject to the approval of the Board" (Pet. App. A4, A23 n.2).

On August 5, 1977, the Union objected to the terms of the settlement stipulation, particularly its failure to provide for the cost-of-living adjustments that had been part of the expired contract, and requested a hearing (Pet. App. A4). This objection was rejected by the Regional Director who approved the settlement and submitted it to the General Counsel for his approval on August 12, 1977 (Pet. App. A4-A5). The Union renewed its objections to the settlement before the General Counsel. However, the General Counsel, after an oral presentation by the Union and while noting that the Union's right to the reinstatement of the cost-of-living adjustments presented a "difficult and complex legal issue," approved the settlement on September 20 and forwarded it to the Board with his recommendation that it be approved (Pet. App. A5). On October 4, 1977, petitioner objected to the granting of a twelve-day extension for the Union to file objections with the

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discontinuance of the unfair labor practice proceedings in exchange for a respondent's voluntary commitment to take specific remedial action. 29 C.F.R. 101.7, 101.9(b)(2). Except for informal settlements entered into after the commencement of the unfair labor practice hearing, informal settlements are not subject to review by the Board. 29 C.F.R. 101.9(b)(2), 101.9(d) (Pet. App. A39-A40).



Board, arguing that delays in processing the settlement while the strike continued were causing it serious harm (Pet. App. A5-A6).

Meanwhile, on September 7, 1977, petitioner began implementing some of the terms of the settlement agreement by revoking its "last contract offer" and restoring the previous conditions of employment as specified in the stipulation (Pet. App. A6). On October 8, 1977, following meetings at which the terms of the settlement were explained to the membership, the Union executed the stipulation. It notified petitioner of its agreement and made an unconditional offer to return to work on behalf of the striking employees. In the same letter, the Union notified petitioner that it accepted the most recent contract proposal, reserving the right to challenge the proposal's reinstatement plan as not complying with the terms of the settlement stipulation. Petitioner accepted the strikers' return to work and resumed production operations (Pet. App. A6).

On October 20, 1977, the Union filed new unfair labor practice charges against petitioner (*Banta II*) alleging that petitioner had violated the Act and the terms of the settlement agreement by discriminating against employees returning to work who had participated in the strike. On October 25, 1977, petitioner notified the Board and the Union that it was withdrawing from the settlement agreement in light of the delay in approving the agreement and the "new issues relative to the Settlement" in *Banta II* (Pet. App. A6-A7).

2. Following extensive arguments by all parties, the Board, on July 14, 1978, refused to permit petitioner to withdraw from the settlement stipulation and entered its order (Pet. App. A31-A33) as specified in the settlement (Pet. App. A7, A29). Noting the General Counsel's final

prosecutorial authority under Section 3(d) of the Act, the Board explained that in formal settlement agreements the General Counsel "exercises that statutory authority by agreeing not to litigate the matter in consideration for the Respondent's agreement to consent to the entry of a Board Order and a consent court decree requiring the Respondent to take certain remedial action" (Pet. App. A27). The Board's authority under the Act is adjudicatory and it is exercised in these circumstances by the Board's review and approval or disapproval of the settlement stipulation presented to it (*ibid.*). Thus the Board stated: "if contract law of offer and acceptance applies, * * * the Respondent's offer to settle, having been accepted by the General Counsel, results in a binding agreement to settle and to submit the settlement stipulation to the Board for approval, with Board approval triggering the duties required of the parties to the settlement stipulation" (*ibid.*). The Board added that, as a policy matter, to permit petitioner to withdraw from the settlement while it was pending Board approval "would undermine the continued efficacy of the settlement process which, as an alternative to lengthy adjudication, allows the Board as well as respondents and charging parties to save time, expense, and the inevitable risk of litigation" (Pet. App. A28). Accordingly, the Board concluded that petitioner, "having agreed to the settlement stipulation herein with the General Counsel, has no right unilaterally to withdraw therefrom pending Board action but must await the Board's determination to approve or disapprove the settlement stipulation" (Pet. App. A29).

3. The court of appeals enforced the Board's consent order (Pet. App. A1-A15). The court specifically held that a party that enters a formal settlement stipulation with the General Counsel has no right to withdraw



unilaterally from that stipulation prior to its approval by the Board (Pet. App. A11). The court stated (Pet. App. A15): "To permit a party to accept the benefits of a settlement agreement, and then withdraw from that agreement without complying with its corresponding obligations, would subvert the settlement process. We believe that the Board properly refused to allow this abuse of its procedures, and accordingly we enforce the Board's order." The court also rejected petitioner's assertion that the Board acted arbitrarily in refusing the attempted withdrawal in this case (Pet. App. A11-A15). The court concluded that the delay in approving the settlement was not grounds for withdrawal because the delay was not unreasonable and should have been foreseen by petitioner (Pet. App. A11). Judge Bryan dissented (Pet. App. A15-A19) on the ground that the Board's delay in approving the settlement entitled petitioner to withdraw.

## ARGUMENT

1. Petitioner contends (Pet. 6-9) that the Board's refusal to permit withdrawal from formal settlement agreements entered into between a party and the General Counsel while they are pending before the Board for its approval is arbitrary. This contention is without merit. The Board has broad discretion to prevent abuse of its settlement procedures. See *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253 (1944). The Board's exercise of that discretion is entitled to deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). As the court of appeals found (Pet. App. A10), permitting a respondent to withdraw unilaterally from a formal settlement approved by the General Counsel would "undermine the continued efficacy of the settlement process." In this case, for example, petitioner's acceptance of the settlement agreement resulted in the General Counsel's abstention

from proceeding to a hearing, which had already been scheduled, and from seeking interim injunctive relief. It also led ultimately to the end of the strike. Similarly, the courts have denied the right of a company to withdraw from a consent agreement that is pending final approval by the Federal Trade Commission. *Johnson Products Co.* v. *FTC*, 549 F. 2d 35 (7th Cir. 1977); *Ford Motor Co.* v. *FTC*, 547 F. 2d 954 (6th Cir. 1976). No court of appeals has held that a respondent may unilaterally withdraw from a settlement agreement.[2] Accordingly, further review by this court is not warranted.

Petitioner specifically contends (Pet. 6-8) that it is arbitrary for the Board to permit withdrawal from informal settlement agreements while precluding withdrawal from formal settlements. This contention ignores the substantive differences between the two procedures. The Board does not "permit" withdrawal from informal settlements. Because an informal settlement does not provide for a Board Order or consent decree, a respondent's failure to adhere to such an agreement results only in the reinstitution of the complaint. *Wallace Corp.* v. *NLRB*, *supra*, 323 U.S. at 254-255. Breach of or withdrawal from a formal settlement, however, which provides for a Board Order and generally a consent decree in the court of appeals, has more serious consequences. It normally will result in a contempt adjudication without the necessity for further unfair labor practice proceedings before the Board. See Board Statements of Procedure, 29 C.F.R. 101.9(e) (Pet. App. A40-A41). Cf. *NLRB* v. *Warren Co.*, 350 U.S. 107, 112-113 (1955). In short, the very purpose of a formal settlement is to provide specific sanctions for its

[2]Petitioner's suggestion that this decision conflicts with *International Ladies' Garment Workers Union* v. *NLRB*, 501 F. 2d 823 (D.C. Cir. 1974), is without foundation. That case holds only that the withdrawal of a complaint pursuant to an informal settlement is reviewable as a "final order of the Board."



breach.[3] Here, petitioner entered into a formal settlement and has no right to be treated as if an informal settlement had been entered instead.

2. Petitioner's further contention (Pet. 9-12) that, in the particular circumstances here, the Board abused its discretion in refusing to permit withdrawal from the settlement was fully considered and properly rejected by the court of appeals (Pet. App. A11-A15). The delay in approving the stipulation was due to serious objections to the terms of the agreement that the General Counsel and Regional Director were obliged to consider carefully.[4] This delay was reasonable and foreseeable by petitioner. Moreover, petitioner does not point to any damage that necessitated its withdrawal from the settlement in late October 1977. By this time the strike had been ended by the Union in reliance on the settlement. Finally, the issue in *Banta II*, whether petitioner had discriminated against returning strikers, was not the same as that presented in the original unfair labor practice charge.[5] In any case, the question of the

[3]It is immaterial that only 2% of cases settled by the Board result in formal settlements (Pet. 9). The purpose of formal settlement agreements is to provide coercive sanctions to ensure compliance with the Act in cases where a respondent's voluntary compliance is in doubt. See *NLRB, Casehandling Manual, Part One, Unfair Labor Practices*, Section 10140.2 (1975). Permitting unilateral withdrawal would eliminate the availability of these coercive sanctions. The fact that the purposes of the Act are fulfilled in most cases by merely accepting respondents' voluntary compliance with the Act is no reason to deny the Board the power to provide stronger sanctions in those cases where it is deemed that voluntary compliance alone would be unacceptable.

[4]Petitioner does not dispute that the delay from October 1977 to July 1978 in approving the settlement was due to petitioner's attempts to withdraw from the settlement (Pet. App. A11 n.7).

[5]As the court of appeals notes (Pet. App. A14-A15), petitioner's objections to the scope of the *Banta II* proceeding should be raised in that proceeding.

Board's alleged abuse of discretion turns solely on the facts of this case and does not warrant further review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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